Filed 6/8/15 P. v. Hines CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIE HINES, Defendant and Appellant.	E059223 (Super.Ct.No. FVI1201464) OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

During an argument over his philandering, defendant Willie Hines kicked his pregnant girlfriend, Tatjana Cruz, in the abdomen and threw a keyboard at her as she lay

unconscious on the floor. Both mother and unborn child died of multiple blunt force injuries. After initially fleeing to Tijuana, defendant turned himself in to authorities. He was charged with two counts of murder (Pen. Code § 187, subd. (a)),[1] along with a multiple murder special circumstance allegation (§ 190.2, subd. (a)(3)). A jury convicted defendant of two counts of second degree murder, and he was sentenced to consecutive terms of 15-years to life in prison. He appealed.

On appeal, defendant argues that (1) the trial court failed to instruct the jury on voluntary manslaughter based on imperfect self-defense; (2) the court failed to instruct the jury *sua sponte* that it could return a verdict of voluntary manslaughter based on excessive force in self-defense; (3) the court failed to instruct the jury on involuntary manslaughter; (4) trial counsel provided ineffective assistance by failing to request additional voluntary and involuntary manslaughter instructions; (5) the voluntary manslaughter instructions impermissibly shifted the presumption in favor of murder; (6) Judicial Council of California Criminal Jury Instructions, CALCRIM Nos. 362 and 376 permit irrational inferences in violation of due process; and (7) the court erred in admitting three autopsy photographs over defendant's objection. We affirm.

BACKGROUND

Defendant and Tatjana Cruz, along with Tatjana's two young children, lived for two months in a residence on Blue Sage Road in Adelanto, where Alana Herring and Pierre O'Neal, their children, and two other adults also resided. Tatjana was pregnant.

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

At approximately 3:00 p.m. on December 14, 2011, defendant and Tatjana were talking in their room, in the presence of Tatjana's two children. Alana Herring entered the room to check on Tatjana, as was her daily routine, but was told by defendant that he and Tatjana were having a heart-to-heart conversation. The room was very neat and there was no hollering or confrontation going on at that time.

At approximately 4:00 p.m., Alana heard arguing and noises coming from Tatjana's room. Alana opened the door of her room and saw items of Tatjana's, as well as Tatjana's children's things, being packed up and taken into a loft area. Tatjana went back into her room, where Alana heard rumbling and noises, such as bumping against the wall or on the floor. Alana went downstairs to tell Pierre because she thought defendant and Tatjana were fighting, that defendant was laying hands on Tatjana, and she wanted Pierre to handle it. Pierre headed up the stairs, followed by Alana.

Approximately half way up the stairs, defendant passed Pierre and Alana as he ran down the stairs, asking them to call the police and an ambulance. Defendant had his backpack and a phone with him. As he ran past, defendant was talking to either his mother[2] or his sister on the cell phone. Pierre overheard defendant tell Murlean Washington, his "mom," on the phone that it was over, he thought this was the last time, and that he thought she was dead. Pierre also reported that defendant told Washington that they got into it and that he had "stomped her and the baby out."

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[2] The person defendant referred to as his mother was actually his cousin, who had raised him as his foster mother.

Alana and Pierre ran up to see what had happened. In the bedroom, they saw Tatjana lying by the closet on the floor, unconscious. She was curled up, holding her abdomen, and her eyes were rolled back. The room was a wreck, with clothes all around. A computer keyboard was near Tatjana's head, with a corner of the keyboard on top of her head. Alana called for an ambulance and paramedics. Pierre carried Tatjana downstairs and put her on a couch.[3] At about that time, the ambulance arrived as well as an officer.

The paramedic found Tatjana in the fetal position on the couch. Tatjana was moved to the ambulance where the paramedic saw bruising on the left side of her face and cheek, some blood coming from her ear (indicating intercranial pressure from a head injury), bruising and swelling to her abdomen, and vaginal bleeding. There were also abrasions and bruises on her chest and shoulder area. Realizing there was some sort of trauma inflicted, the paramedic decided to airlift Tatjana to the trauma center.

At the trauma center, delivery of the fetus was induced because an ultrasound revealed the infant was dead. Tatjana had sustained multiple blunt force injuries to her abdomen, uterus, and both sides of her head. Extensive hemorrhage on the right side of Tatjana's abdominal cavity was consistent with blunt force trauma inflicted to the exterior of her abdomen. Medical records and an autopsy examination indicated Tatjana suffered an abrupted placenta as a result of trauma to the abdomen. To cause the injuries would require a great deal of force.

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[3] Defendant testified that he was the person who carried Tatjana downstairs.

Externally, the fetus looked normal for approximately 24 weeks of gestation. Internal examination revealed the baby's liver was crushed, the lung was lacerated, and the thoracic spine was fractured. Hemorrhage around the site of the fractured spine indicated the fetus was alive when the spine was fractured. To cause the injuries sustained by the fetus would require a very hard blow, low on the mother's abdomen. The cause of the fetus's death was maternal and fetal blunt force injuries.

In the meantime, defendant got a ride to Los Angeles Union Station where he purchased a train ticket to San Diego. At some point, he unbraided his hair to change his appearance. In San Diego, defendant purchased a change of clothes and discarded his old clothes. Then he crossed the border into Tijuana. Although he intended to go further south, defendant returned to San Diego and turned himself in to a shopping mall security officer. Detective Davenport of the San Bernardino County Sheriff's Office came to San Diego to take custody of defendant and interviewed him three times.

Defendant was charged with two counts of first degree murder (§ 187, subd. (a)), along with a multiple murder special circumstance allegation (§ 190.2, subd. (a)(3)). Defendant was tried by a jury, which returned two verdicts of guilty of the lesser offense of second degree murder. Defendant was sentenced to two consecutive terms of 15 years to life. Defendant timely appealed.

DISCUSSION

1. *The Court Was Not Required to Instruct on Imperfect Self-Defense, Excessive Force in Self-Defense, or Misdemeanor Involuntary Manslaughter Sua Sponte.*

At the defendant's request, the trial court instructed the jury on the lesser included offense of voluntary manslaughter on a theory of heat of passion or provocation. The court also instructed the jury that the homicide would be excused if defendant killed Tatjana by accident in the heat of passion. Defendant did not request and the court did not instruct on any other theory of manslaughter. In separate arguments, defendant argues that the court erred in failing to instruct on (a) voluntary manslaughter based on imperfect self-defense; (b) voluntary manslaughter based on excessive force in self-defense and (c) involuntary manslaughter based on misdemeanor excessive force and unreasonable self-defense. We disagree.[4]

It is well settled that a trial court has the duty to instruct on all general principles of law relevant to the issues raised by the evidence, with or without a formal request by the defendant. (*People v. Blair* (2005) 36 Cal.4th 686, 744, overruled on another point in *People v. Black* (2014) 58 Cal.4th 912, 915; *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) This obligation encompasses instructions on lesser included offenses

[4] Because we conclude the court had no duty to give the instructions indicated by defendant on appeal due to the insufficiency of evidence to support those theories, we do not need to consider defendant's alternate claim that he was deprived of effective assistance of counsel based on the failure to request the instruction. (*People v. Jennings* (2010) 50 Cal.4th 616, 667, fn. 19.) On the facts before us, defense counsel could have reasonably determined that requesting such instructions would have been fruitless. The failure to request a factually and legally unsupported instruction is not ineffective assistance of counsel. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.)

if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not the lesser. (*People v. Rogers* (2006) 39 Cal.4th 826, 866 (*Rogers*).)

A trial court therefore must instruct on all theories of a lesser included offense which find substantial support in the evidence. (*Breverman, supra,* 19 Cal.4th at p. 162.) The determination of whether there is substantial evidence to warrant instructions on lesser included offense is evidence sufficient to deserve consideration by the jury, that is, evidence that a reasonable jury could find persuasive. (*People v. Barton* (1995) 12 Cal.4th 186, 201 (*Barton*).) In deciding whether evidence is substantial in this context, the court determines only its bare legal sufficiency, not its weight. (*Breverman, supra,* 19 Cal.4th at p. 177.)

A trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a charged offense only if there is substantial evidence which, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733 (*Waidla*).) The duty to instruct applies regardless of the parties' requests or objections to prevent the "strategy, ignorance, or mistakes" of either party from presenting the jury with an unwarranted all-or-nothing choice, thereby encouraging a verdict "no harsher or more lenient than the evidence merits," and protecting the jury's "truth-ascertainment function." (*Breverman, supra,* 19 Cal.4th at p. 155; *Barton, supra,* 12 Cal.4th at pp. 186, 196.)

An appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than,

and included, in a charged offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181; *Waidla, supra,* 22 Cal.4th at p. 733.)

a. Imperfect Self-Defense

The doctrine of imperfect self-defense applies when the defendant has an honest but unreasonable belief that it is necessary to defend himself from "imminent peril to life or great bodily injury." (*People v. Flannel* (1979) 25 Cal.3d 668, 674.) This is a narrow "defense"[5] that will apply only when the defendant has an *actual* belief in the need for self-defense and only when the defendant fears *imminent* danger to life or great bodily injury, that must be instantly dealt with. (*In re Christian S.* (1994) 7 Cal.4th 768, 783; *Rogers, supra,* 39 Cal.4th at p. 883.) The trial court's duty to instruct on this theory arises "whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*Rogers,* at p. 883, quoting from *Barton, supra,* 12 Cal.4th at p. 201.)

Here, the defendant testified that Tatjana threatened to bleach his clothing, and that he believed she was going to kick him in the groin when he kneed her in the abdomen. The presence of a bottle of bleach in the room supports defendant's fear that Tatjana would try to ruin his clothing. However, according to defendant's own testimony, at the time defendant kneed her in the abdomen, she was turned away from him with his cell phone in one hand, bent over with her hand outstretched, trying to keep

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[5] Imperfect self-defense is not a true affirmative defense; rather, it is a shorthand description of one form of voluntary manslaughter, which is not a defense but a crime. (*Barton, supra,* 12 Cal.4th at pp. 200-201.)

it out of his reach. Her relative position undermines any reasonable fear of being kneed in the groin. And even if he entertained such a fear, it does not constitute fear of imminent danger to life or great bodily injury. There is no substantial evidence to support even an unreasonable fear of imminent infliction of death or serious bodily injury.

b. Excessive Force in Self-Defense

Under principles of self-defense, only that force which is necessary to repel an attack is justified; force which exceeds the necessity is not justified. (*People v. Clark* (1982) 130 Cal.App.3d 371, 380.) Further, deadly force or force likely to cause great bodily injury may be used only to repel an attack which in itself is deadly or likely to cause great bodily injury. (*Ibid.*) Under these two principles, a person may be found guilty of unlawful homicide even where the evidence establishes the right to self-defense if the jury finds that the nature of the attack did not justify the resort to deadly force or that the force used exceeded that which was reasonably necessary to repel the attack.

Defendant urges these principles in arguing that the trial court was required to instruct, *sua sponte*, that they could return a verdict of voluntary manslaughter if they found defendant used excessive force in self-defense. It is true that where a person unintentionally or intentionally kills in unreasonable self-defense, the killer is guilty of voluntary manslaughter. (*People v. Blakeley* (2000) 23 Cal.4th 82, 88 (*Blakeley*).) But there was no evidence that defendant feared danger to his life or great bodily injury.

Defendant argues, without authority, that a person who kills another unintentionally based on unreasonable self-defense cannot be guilty of voluntary

manslaughter, because under black letter law, voluntary manslaughter requires the intent to kill. This is incorrect: intent to kill is not an element of voluntary manslaughter. (*People v. Bryant* (2013) 56 Cal.4th 959, 967 (*Bryant*), citing *People v. Lasko* (2000) 23 Cal.4th 101, 108-111, and *Blakeley*, *supra*, 23 Cal.4th at pp. 88-91.) In *Blakely*, the California Supreme Court held that where one unintentionally kills in unreasonable self-defense, the killing is voluntary, not involuntary, manslaughter. (*Id.* at pp. 88-89.)

Lacking sufficient evidence to support imperfect self-defense, it follows necessarily that there was insufficient evidence to support a theory of excessive force during self-defense. As discussed previously, the threat to bleach defendant's clothing does not support even an unreasonable belief in the need to use deadly force. Further, Tatjana's act of grabbing defendant's cell phone and attempting to prevent him from recovering it by turning her back and bending over, does not constitute substantial evidence to support an unreasonable belief in the need for self-defense.

Defendant argues that the instruction was warranted because Hines testified that he struck Tatjana after she had elbowed and punched him numerous times and he believed she was about to kick him in the groin. However, this assertion is belied by defendant's testimony that at the time he kneed her in the abdomen she had her back to him, and was bent over with her arm outstretched to keep the cell phone out of his reach.

Insofar as the court's duty to instruct arises when there is substantial evidence to support the theory, defendant's testimony was insufficient.

c. Involuntary Manslaughter Based on Misdemeanor, Excessive Force and Unreasonable Self-Defense.

Defendant also argues the court was under a *sua sponte* duty to instruct the jury on the lesser, necessarily include offense of involuntary manslaughter. We disagree.

Section 192, subdivision (b), defines involuntary manslaughter as the unlawful killing of a human being, without malice, in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

A killing without malice in the commission of a noninherently dangerous felony would constitute involuntary manslaughter if committed without due caution and circumspection. (*Bryant, supra,* 56 Cal.4th 959, 966.) An unintentional killing committed by one who unreasonably believes he needs to defend himself is voluntary, not involuntary manslaughter. (*Blakeley, supra,* 23 Cal.4th at pp. 88-89.)

Defendant asserts the evidence established a factual premise supporting an instruction on involuntary manslaughter based on misdemeanor battery. He relies on the decision of *People v. Burroughs* (1984) 35 Cal.3d 824 [disapproved in *Blakeley, supra,* 23 Cal.4th at p. 89] to support his position that an unintentional homicide committed in the course of a noninherently dangerous felony may support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection. (*Id.,* at p. 835.)

Defendant's reasoning is flawed because a battery which results in serious bodily injury is a felony, not a misdemeanor. (§ 243, subd. (d); *People v. Wade* (2012) 204

Cal.App.4th 1142, 1147-1148.) The nature and extent of the injury actually suffered by a victim determines whether the force used was felonious in nature. (*People v. Covino* (1980) 100 Cal.App.3d 660, 667, citing *People v. Wells* (1971) 14 Cal.App.3d 348, 358.) A battery causing serious bodily injury is a serious felony, within the meaning of section 1192.7, subdivision (c)(8). (*People v. Moore* (1992) 10 Cal.App.4th 1868, 1871; see also, *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1613.)

Defendant cites several cases for the proposition that a court is required to instruct on both voluntary and involuntary manslaughter based on an unreasonable self-defense. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85-87 (*Ceja*); *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1557-1558; *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1461.)[6] Those holdings are no longer sound precedent for that proposition. (See *Blakeley, supra,* 23 Cal.4th at p. 91 [disagreeing with *Glenn* and *Ceja*].) There is no current legal theory warranting an instruction on principles of involuntary manslaughter based on a killing committed in the course of imperfect self-defense.

The evidence did not support a misdemeanor manslaughter theory or a theory of involuntary manslaughter based on a killing committed in the course of imperfect self-defense.

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[6] Defendant also relies on *People v. Cameron* (1994) 30 Cal.App.4th 591, but that case involved intoxication and provocation as defenses to implied malice. There, the court noted that evidence of intoxication could be material to the defense of unintentional killing in the course of imperfect self-defense. (*Id.*, at p. 601.) In any event, as it pertained to intoxication, the decision in *Cameron* was abrogated by the 1995 amendment to section 22, subdivision (b).

2. *The Instructions on Voluntary Manslaughter Did Not Shift the Burden or Create an Impermissible Presumption of Murder.*

Defendant argues that the pattern jury instructions (CALCRIM Nos. 522, 570) violated defendant's due process right to the presumption of innocence. He concedes that the instructions given in this case correctly state the law of heat of passion voluntary manslaughter, but asserts that they slanted the determination of the pivotal issue—whether to reduce murder to manslaughter—toward the prosecution. We disagree.

In reviewing a claim that the court's instructions were incorrect or misleading, we must determine whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332 (*Hernandez*), citing *People v. Cross* (2008) 45 Cal.4th 58, 67-68.) We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*), quoting *People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) We make our determination using the independent or de novo standard of review. (*Ramos, supra,* 163 Cal.App.4th at p. 1088.)

CALCRIM No. 522 explains how provocation may reduce a murder from first degree to second degree, and may reduce a murder to manslaughter. That instruction has been upheld as correct. (*Hernandez, supra,* 183 Cal.App.4th at p. 1334; *People v. Jones* (2014) 223 Cal.App.4th 995, 1001 (*Jones*).) In *Hernandez, supra*, the Court of Appeal rejected defendant's claim that CALCRIM No. 522 was misleading, concluding it was

not error for the trial court to instruct the jury with CALCRIM No. 522. (*Hernandez*, at pp. 1335-1336.) *Jones* followed *Hernandez*. (*Jones*, at p. 1001.)

CALCRIM No. 570 defines the crime of voluntary manslaughter based on heat of passion. The California Supreme Court has held that the instruction is not ambiguous. (*People v. Beltran* (2013) 56 Cal.4th 935, 954 (*Beltran*).) In *Jones*, the reviewing court analyzed CALCRIM No. 570 upon a claim that it was likely to have misled the jury, concluding that the instruction was correct. (*Jones, supra*, 223 Cal.App.4th at p. 1001.)

As the court in *Jones* stated, "They [CALCRIM Nos. 522 and 570] accurately inform the jury what is required for first degree murder, and that if the defendant's action was in fact the result of provocation, that level of crime was not committed. CALCRIM Nos. 521 and 522, taken together, informed the jurors that 'provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' [Citation omitted.] As the jury also was instructed, a reduction of murder to voluntary manslaughter requires more. It is here, and only here, that the jury is instructed that provocation alone is not enough for the reduction; the provocation must be sufficient to cause a person of average disposition in the same situation, knowing the same facts, to have reacted from passion rather than judgment. There was no error in giving these instructions." (*Jones, supra*, 223 Cal.App.4th at p. 1001.)

Defendant argues that his testimony raised a reasonable doubt as to whether he had killed Tatjana deliberately and dispassionately or whether he had struck her as a reflexive act of anger at her earlier blows and the taking of his cell phone. He also argues

it is likely that the jurors had at least some doubt as to whether defendant killed Tatjana and her unborn child in the heat of passion. Not so. The jury was instructed that provocation can reduce murder from first degree to second degree. However, heat of passion, an additional requirement, was required to reduce it further to manslaughter. For provocation to rise to the level of heat of passion, the focus is on the defendant's state of mind, and the question is whether the average person would *react* in a certain way: with his reason and judgment obscured. (*Beltran, supra,* 56 Cal.4th at p. 949.)

The relevant standard is an objective one; the facts and circumstances must be sufficient to arouse the passions of the ordinarily reasonable man. (*Beltran, supra,* 56 Cal.4th at p. 950.) While defendant points to his testimony to show he struck Tatjana out of anger, nowhere does he demonstrate that his anger rose to the level of passion needed to further reduce the degree of the crime, nor does he demonstrate that a reasonable man's passions would have been similarly aroused to the point of violently striking Tatjana's abdomen with sufficient force to abrupt the placenta, crush the liver and fracture the spine of her unborn child.

The jury properly evaluated the evidence and was not confused by the instructions, which were not misleading on any level.

3. *The Pattern Instructions Relating to Consciousness of Guilt Were Proper.*

Defendant argues that the pattern instructions in CALCRIM Nos. 362 (consciousness of guilt based on false statements) and 372 (consciousness of guilt based on flight) were improper. He argues that CALCRIM No. 362 allowed the jury to infer guilt in a manner that "runs afoul of the constitutional limitation noted by the Ninth

Circuit" in *Turner v. Marshall* (9th Cir.1995) 63 F.3d 807, at page 820, and that CALCRIM No. 372 violates due process because it raises an irrational permissive inference. We disagree.

CALCRIM No. 362 is the successor to CALJIC No. 2.03, with minor differences found to be insufficient to undermine the Supreme Court's approval of CALJIC No. 2.03. (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104.) The reviewing court in *McGowan* thus upheld CALCRIM No. 362. More recently, the California Supreme Court has rejected a similar argument in holding that CALCRIM No. 362 does not invite the jury to draw irrational and impermissible inferences. (*People v. Moore* (2011) 51 Cal.4th 386, 414, relying on *People v. Howard* (2008) 42 Cal.4th 1000, 1021.) We agree with these holdings: CALCRIM No. 362 is proper.

Similarly, case law has long established that instructions permitting an inference of guilt from the fact of a defendant's flight after crime are constitutional and appropriate. (See, *People v. Carrasco* (2014) 59 Cal.4th 924, 967-968, citing *People v. Avila* (2009) 46 Cal.4th 680, 710; *People v. Paysinger* (2009) 174 Cal.App.4th 26, 31-32.) CALCRIM No. 372 does not impermissibly presume the existence of defendant's guilt or lower the prosecution's burden of proof. (*People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1159.)

Both instructions were properly read to the jury, did not create an impermissive inference, or lessen the prosecutor's burden of proof.

4. *The Trial Court Did Not Abuse Its Discretion in Admitting Three Autopsy Photos, Which Were Necessary to the Pathologist's Expert Opinion.*

During trial, the prosecution offered several autopsy photographs of Tatjana and her fetus. Defendant objected to Exhibits 17, 18, 19, 20, 37, 38, 39, 41, 49, 50 and 51 on the grounds that any probative value of the photographs was outweighed by their prejudicial value. The court reviewed the photographs *in limine* and excluded Exhibits 17, 20 and 37 as prejudicial even prior to hearing from the pathologist. The court subsequently conducted an Evidence Code section 402 hearing, in which the forensic pathologist testified about the relevance of the photographs. Based on the pathologist's testimony, the court ruled that Exhibits 38, 39 and 50[7] were admissible, but excluded Exhibits 19, 40, 41, and 49. Exhibits 17, 19, 20, 37, and 41 were not offered into evidence. On appeal, defendant's challenge focuses on Exhibits 38, 39, and 50, arguing that due to their gruesome nature, the trial court abused its discretion. We disagree.

Evidence Code section 352 provides that a court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, or confusing the issues, or of misleading the jury. The admission of autopsy photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. (*People v. Montes* (2014) 58 Cal.4th 809, 862.) The appropriate standard of review for determining

[7] Because two exhibits were stuck together, Exhibit 50 was mistakenly referred to as Exhibit 51. The pathologist's testimony therefore related to the relevance of Exhibit 50.

whether admission of such photographs was error is the abuse of discretion standard. (*People v. Clair* (1992) 2 Cal.4th 629, 655.) The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs is outweighed by their prejudicial effect. (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134.)

The prejudice referred to in section 352 is evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. (*People v. Heard* (2003) 31 Cal.4th 946, 976 (*Heard*).) Unnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment. (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997-998, citing *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269.) However, victim photographs and other graphic items of evidence in homicide cases are always disturbing. (*Heard*, *supra*, 31 Cal.4th at p. 976.)

Nevertheless, where the photographs portray the results of defendant's violent conduct, the fact they are graphic and unpleasant does not necessarily render the introduction of the images unduly prejudicial. (*Heard, supra,* 31 Cal.4th at p. 976.) For instance, photographic evidence may assist the jury in understanding and evaluating the testimony. (*People v. Michaels* (2002) 28 Cal.4th 486, 532.)

Here, the autopsy photographs were probative in that they assisted the jury in understanding the testimony of the pathologist as to the nature and extent of the fatal injuries and concomitant hemorrhaging to Tatjana and the fetus. Exhibit 38 shows hemorrhage and lacerations to the liver of the fetus. Exhibit 39 shows the fracture of the

fetus's spine and abdominal hemorrhage. Exhibit 50 shows the damage and hemorrhage to the psoas muscle attached to Tatjana's spine.

The exhibits were important to the pathologist's testimony about the amount of force used in kicking Tatjana's abdomen. We have viewed the exhibits, and while they are unpleasant, they are not of such a nature as to overcome the jury's rationality. The trial court excluded several additional photographs based on the pathologist's testimony that his verbal description of the findings would be sufficient, and admitted only those photographs that the pathologist determined to be necessary to an understanding of his findings and conclusion. The trial court thus engaged in the appropriate weighing of the factors and performed its balancing function under Evidence Code section 352. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.